

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2127

Cir. Ct. No. 2011CV2297

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**THE ESTATE OF NORBERT W. DIER, BY CO-PERSONAL
REPRESENTATIVES DAVID C. DIER AND DEBRA A. BOUCHER, THE
ESTATE OF MYRA A. DIER, BY CO-PERSONAL REPRESENTATIVES
DAVID C. DIER AND DEBRA A. BOUCHER, DAVID C. DIER AND
DEBRA A. BOUCHER,**

PLAINTIFFS-APPELLANTS,

V.

**ROB L. PUYLEART, PROGRESSIVE UNIVERSAL INSURANCE COMPANY,
AMERICAN FAMILY MUTUAL INSURANCE COMPANY, KATHLEEN
SEBELIUS, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN
SERVICES OF THE UNITED STATES OF AMERICA AND AMERICAN
REPUBLIC INSURANCE COMPANY,**

DEFENDANTS,

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County:
MARC A. HAMMER, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. The Estates of Norbert and Myra Dier, along with the Diers' surviving adult children, David Dier and Debra Boucher, appeal a summary judgment dismissing their underinsured motorist (UIM) coverage claim against Wisconsin Mutual Insurance Company. They contend the circuit court erred when it determined there was no UIM coverage under the subject policy. Based on this court's decision in *Belding v. Demoulin*, 2013 WI App 26, 346 Wis. 2d 160, we agree. Therefore, we reverse the judgment and remand the matter for further proceedings.

BACKGROUND

¶2 On April 1, 2011, Norbert and Myra Dier's vehicle was struck head-on by Robert Puyleart's vehicle after Puyleart crossed the center line of Highway 54 in Brown County. The Diers died as a result of injuries sustained in the collision. Puyleart's insurer, Progressive Universal Insurance Company, paid its policy limits. American Family Mutual Insurance Company, which insured the vehicle driven by Norbert at the time of the collision, paid its UIM limits.

¶3 This appeal involves UIM coverage under a business automobile policy issued by Wisconsin Mutual to Norbert, d/b/a Dier Construction, for two vehicles that were not involved in the collision. The circuit court granted Wisconsin Mutual's summary judgment motion, concluding that no UIM coverage

existed under the policy based on its “drive other car” exclusion. This appeal follows.

DISCUSSION

¶4 We review summary judgments independently, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).¹

¶5 Under the subject policy, there is UIM coverage for each vehicle at \$100,000 per person and \$300,000 per accident. The policy, however, excludes coverage for “bodily injury” sustained by:

- a. An individual Named Insured while “occupying” or when struck by any vehicle owned by that Named Insured that is not a covered “auto” for Underinsured Motorists Coverage under this coverage form;
- b. Any “family member” while “occupying” or when struck by any vehicle owned by that “family member” that is not a covered “auto” for Underinsured Motorists Coverage under this coverage form; or
- c. Any “family member” while “occupying” or when struck by any vehicle owned by the Named Insured that is insured for Underinsured Motorists Coverage on a primary basis under any other coverage form or policy.

This type of “drive other car” exclusion is authorized under WIS. STAT. § 632.32(5)(j), which provides:

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

A policy may provide that any coverage under the policy does not apply to a loss resulting from the use of a motor vehicle that meets all of the following conditions:

1. Is owned by the named insured, or is owned by the named insured's spouse or a relative of the named insured if the spouse or relative resides in the same household as the named insured.
2. Is not described in the policy under which the claim is made.
3. Is not covered under the terms of the policy as a newly acquired or replacement motor vehicle.

¶6 From November 1, 2009 until November 1, 2011, however, WIS. STAT. § 632.32(6)(d) prohibited antistacking clauses, specifying:

No policy may provide that, regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, the limits for any uninsured motorist coverage or underinsured motorist coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles to determine the limit of insurance coverage available for bodily injury ... suffered by a person in any one accident, except that a policy may limit the number of motor vehicles for which the limits of coverage may be added to 3 vehicles.

Thus, at the time of the Diers' collision, both WIS. STAT. § 632.32(5)(j), authorizing "drive other car" exclusions, and § 632.32(6)(d), prohibiting antistacking clauses in UIM coverage, were in effect.

¶7 In *Belding*, this court addressed the purported conflict between these two statutes, interpreting them to give effect to all the applicable provisions under the statutory scheme. *Belding*, 346 Wis. 2d 160, ¶18. The court noted that under WIS. STAT. § 632.32(5)(e), "only exclusions not prohibited by subsection (6) or other applicable law are enforceable." The court ultimately held that drive other car exclusions could not prevent the stacking of uninsured motorist (UM)

coverage limits for up to three vehicles owned by the same insured during the two-year period when the competing statutes were in force. *Id.*, ¶21.

¶8 Although *Belding* involved UM rather than UIM coverage, and a personal rather than business automobile policy, we conclude its analysis applies to the facts of this case. These distinctions are of no consequence under WIS. STAT. § 632.32(6)(d), as the statute does not distinguish between types of automobile policies and governs the policy limits for both UM and UIM coverage. Because the “drive other car” exclusion in the Wisconsin Mutual policy could not prevent the stacking of UIM coverage limits under the law as it existed at that time, we reverse the judgment and remand the matter for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

